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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1939

No. 397

THE UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY, CHARLES L. DRESSEL,
HARRY M. RESER, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MO-
TION TO DISMISS ON BEHALF OF APPELLEES
SIDNEY WANZER & SONS, INC., INTERNATIONAL
DAIRY COMPANY, GORDON B. WANZER, H. STAN-
LEY WANZER, LOUIS JANATA AND MILK DEAL-
ERS' BOTTLE EXCHANGE.

LOY N. McINTOSH,
BERNHARDT FRANK,
Counsel for Appellees.

GANN, SECORD, STEAD & McINTOSH,
Of Counsel.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 31197

UNITED STATES OF AMERICA,

vs.

THE BORDEN COMPANY, ET AL.,

Defendants.

STATEMENT OF DEFENDANTS (APPELLEES) SIDNEY WANZER & SONS, INC., A CORPORATION; INTERNATIONAL DAIRY COMPANY, A CORPORATION; GORDON B. WANZER, H. STANLEY WANZER, LOUIS JANATA, AND MILK DEALERS' BOTTLE EXCHANGE, A CORPORATION, IN OPPOSITION TO JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

Conformably with Rule 12 of the Supreme Court of the United States, as amended, defendants (appellees) named in above caption respectfully present this statement in opposition to the jurisdiction of said Supreme Court to entertain the appeal allowed herein under the Criminal Appeals Act. Said named defendants (for convenience referred to as

the Wanzer Group) filing this opposing statement, filed their several demurrers containing the specification, as Paragraph 5 of each thereof, that sole and exclusive jurisdiction over the production and marketing of milk had been devolved upon the executive branch of the government and withdrawn from initial judicial power. The defendants filing this opposing statement presented a printed opening brief and a printed reply brief in support of said demurrers. No plea in bar raising the contention as to supremacy and exclusiveness of executive power was filed by any defendant, nor was any special plea of any nature filed or presented. Not until the hearing on the settlement of the order sustaining the demurrers was there any intimation that any demurrer was to be considered as a special plea in bar. At the last named hearing, counsel for the government for the first time intimated that, under the limitations of the Criminal Appeals Act, there might be doubt as to jurisdiction unless said demurrers were treated as special pleas in bar.

With these preliminary observations in mind, let us proceed to reply in the sequence of the government's statement of jurisdiction:

A. The statutory jurisdiction of the Supreme Court under the Criminal Appeals Act is limited and strictly construed. That jurisdiction confers the "exceptional right to review in favor of the United States (*United States v. Koitel*, 211 U. S. 370, 399), and is "an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms" (*United States v. Dickinson*, 213 U. S. 92, 103).

B. The government's statement recites, "The Statute of the United States, the construction of which is involved herein, is Section 1 of the Sherman Act • • •"—a penal statute providing for punishment "by fine not exceeding \$5000, or by imprisonment not exceeding one year, or by

both said punishments, in the discretion of the court." (U. S. C. Title 15, Sec. 1; 26 Stat. 209.)

C. The defendants (appellees) filing this opposing statement are distributors of fluid milk in the City of Chicago (excepting that one of their number, the Milk Dealers' Bottle Exchange, is a mere local plant facility engaged in the rendition of a mere service to local dealers). The court sustained the demurrers to Counts 1, 2 and 4 upon said Paragraph 5 of the demurrers filed by the Wanzer Group, wherein the question as to the exclusive, supreme and plenary jurisdiction of the Secretary of Agriculture over milk production and marketing was presented.

I.

The "Construction" of Section 1 of the Sherman Act is not involved; wherefore the Supreme Court is without jurisdiction.

This is not a case where the decision on the demurrer to the indictment finds that "the acts charged are not within the statute" (cf. *United States v. Patten*, 226 U. S. 525, 535). Here the decision of the district court is a finding that said court had been deprived of initial judicial power over the subject matter set forth in the indictment by the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750), and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246).

It is elementary that two or more different statutes cannot be considered in the process of construction unless such statutes be *in pari materia*. As stated in *United States v. Anderson*, 9 Wall. (U. S.) 56,

"The two acts cannot be construed *in pari materia*. The one is penal, the other remedial; the one claims a right, the other concedes a privilege."

The scope of "construction" of a statute is defined in *Lake County v. Rollins*, 130 U. S. 662, at 670:

"To get at the thought of meaning expressed in a statute, a contract or a Constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involved no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. . . . So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Obviously Section 1 of the Sherman Act and the Agricultural Acts cannot be said to be *in pari materia*; and unless the separate, several and remedial Agricultural Acts be held to be *in pari materia* with Section 1 of the Sherman Act, said Agricultural Acts cannot be drawn within the process of construction of the separate, unrelated and *penal* statute, viz., Section 1 of the Sherman Anti-Trust Act. Jurisdiction of the appeal, therefore, fails.

II.

The specification of the Wanzer demurrers, as to the exclusiveness of executive power over milk production and marketing does not constitute a special plea in bar.

The function of a special plea in bar is to set up a defense dehors the record, as the cases cited on the last page of the government's jurisdictional statement disclose.

Thus citizenship of an Indian charged with murder of

another Indian (*United States v. Celestine*, 215 U. S. 278); the defense of the statute of limitations (*United States v. Barber*, 219 U. S. 72; *United States v. Goldman*, 277 U. S. 299); and the defenses of former jeopardy or acquittal (*United States v. Oppenheimer*, 242 U. S. 85; *United States v. Thompson*, 251 U. S. 407) represent the range of instances relied upon by the government to support jurisdiction on the theory that the said demurrers constituted a special plea in bar.

Obviously, the defenses of statute limitations and of former jeopardy or acquittal present a subject matter widely different from that of the instant case; which leaves the Indian case. (*United States v. Celestine*, 215 U. S. 278) as the basis of the government's theory that Paragraph 5 of the Wanzer demurrers constituted a special plea in bar.

In *United States v. Celestine*, 215 U. S. 278, the Supreme Court reversed an order sustaining a special plea in bar in a prosecution against an Indian for murder of another Indian within the limits of an Indian Reservation in the State of Washington. The Supreme Court held that such an offense by an Indian so circumstanced was not excepted from the exclusive jurisdiction of the Federal courts under the Act of March 3, 1885, Section 9, because both parties held land patents from the United States issued under the authority of the Treaty with the Omahas of March 16, 1854, and the Treaty of Point Elliott of January 22, 1885, and that the provisions of the Act of February 8, 1887, Section 6, providing that, upon the completion of land allotments and the patenting of the lands to said Indian allottees, such Indians, upon certain conditions, are declared to be citizens of the United States, did not divest the jurisdiction of Federal courts over offenses committed by one Indian upon the person of another Indian within the limits of a reservation. The special plea filed by the Indian was directed against the

jurisdiction of the circuit court on the ground that he "has been and still is a citizen of the United States, and therefore subject to the laws of the territory and state of Washington."

Concerning the Indian's special plea in bar, the Supreme Court, in the *Celestine* case, in construing Paragraph 4 of the Criminal Appeals Act of 1907 (relating to review of special pleas in bar), at page 283, said:

"The fourth paragraph of the act of March 2, 1907, supra, authorizes a review of a 'decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.' The defendant in this case had not been put upon trial, therefore he had not been in jeopardy. The decision of the circuit court sustained the special plea in bar. This fourth paragraph differs from the two preceding, in that the review authorized by them is limited to cases in which 'the decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded,' while no such limitation appears in this paragraph. The full significance of this difference need not now be determined, but clearly the fourth paragraph gives to this court a right to review the precise question decided by a trial court in sustaining a special plea in bar, although that decision may involve the application rather than the validity or construction, strictly speaking, of the statute upon which the indictment was founded."

The above quoted differentiation of the language of the fourth paragraph of the Criminal Appeals Act has no pertinency to the instant case; for the question as to the supreme, exclusive and plenary jurisdiction of the Secretary of Agriculture *does not present an application of the statute upon which the indictment is based, viz.,* Section 1 of the Sherman Act, but rather of the Agricultural Acts.

In the *Celestine* case, the facts surrounding the Indian

were personal to him and resulted from his voluntary action.

In the instant case, the Agricultural Acts have withdrawn initial judicial power from the Federal district courts over the general subject matter of the production and marketing of agricultural commodities, including milk, thereby carving from Section 1 of the Sherman Act any application to such commodities. In other words, the Agricultural Acts have disqualified district courts from exercising initial judicial power. The decision of the District Court that it was without judicial power and that the Secretary of Agriculture has exclusive power over agricultural commodities, including milk, was a finding relative to the disability of the District Court itself, and did not relate to any claim of right or privilege of the defendants arising out of any voluntary action or conduct on their part. Such a construction of Federal law by the District Court itself, as to its own lack of jurisdiction, is not within the purview or scope of a special plea in bar under which the application of a statute may be applied to voluntary action on the part of a defendant as distinguished from disability inhering within the jurisdiction of a court, as a court.

The very fact that the learned counsel for the government base their sole substantial ground of jurisdiction under the Criminal Appeals Act upon the theory that Paragraph 5 of the Wanzer demurrers constituted a special plea in bar, is a conclusive demonstration that the government has grave doubt concerning the jurisdiction of the Supreme Court to entertain the appeal.

The picture of the Agricultural legislation beginning with 1933, as part of the Recovery program, in the period of world-wide economic chaos, is not one of fact dependent upon voluntary action or status of the citizen. That legislation appears on the Federal statute books. The several

departments of government are presumed to know the Federal statutes. If one department of government, viz., Department of Justice, overlooks an existing code of laws having the effect of removing initial judicial power over a subject matter, the citizen confronted with an indictment under Section 1 of the Sherman Act is not called upon to file a special plea in bar to that effect. Nor is such a citizen to blame for the narrow limitations of the government's right of review under the Criminal Appeals Act. Until Congress, by appropriate amendment, enlarges the scope of review under the Criminal Appeals Act, the question presented: Whether the supreme, exclusive and plenary jurisdiction of the Secretary of Agriculture over the production and marketing of agricultural products, including milk, by the agricultural legislation since 1933, has removed initial judicial power, so as to carve from the purview of Section 1 of the Sherman Act any application to such commodities, does not present a question of "construction" or, indeed, of the "application" of the statute upon which the indictment herein was returned.

III.

The instances of monopoly cases involving agricultural products or railroads are not in point.

The government closes its statement of jurisdiction with the suggestion that the question decided by the District Court is contrary to the decisions of the Supreme Court in Sherman Act cases involving agricultural products; but, as none of those cases raised the point decided by the District Court and as all of them were prior to the Agricultural Adjustment Act of 1933, they are not in point. The last case, *Sugar Institute v. United States*, 297 U. S. 553, was decided as late as March 30, 1936, prior to the Agricultural Marketing Agreement Act of 1937. So with the four rail-

road cases, the last in volume 228 U. S., no similarity exists because of incidental control by the Interstate Commerce Commission. Clearly acquisition of the capital stock of a competing railroad, or agreements between railroads as to distribution of freight or passenger traffic, present an entirely different situation, especially in view of the course of amendment of the Interstate Commerce Commission legislation.

For the respective reasons herein presented, it is deferentially urged that the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

(Sgd.)

GANN, SECORD, STEAD AND
McINTOSH,
LOY N. McINTOSH,
BERNHARDT FRANK,

Attorneys for Said Defendants (Appellees).

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. 1939

No. 397

UNITED STATES OF AMERICA,

Appellant,

vs.

THE BORDEN COMPANY ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

HONORABLE CHARLES E. WOODWARD, *District Judge.*

MOTION OF APPELLEES SIDNEY WANZER & SONS,
INC., A CORPORATION; INTERNATIONAL DAIRY
COMPANY, A CORPORATION; GORDON B. WAN-
ZER, H. STANLEY WANZER, LOUIS JANATA, AND
MILK DEALERS' BOTTLE EXCHANGE, A CORPO-
RATION, TO DISMISS APPEAL.

Now come appellees, Sidney Wanzer & Sons, Inc., a cor-
poration; International Dairy Company, a corporation;

Gordon B. Wanzer, H. Stanley Wanzer, Louis Janata, and Milk Dealers' Bottle Exchange, a corporation, by Loy N. McIntosh and Bernhardt Frank, their counsel, and move to dismiss the appeal herein for the reasons set forth in the statement of said appellees in opposition to the jurisdictional statement filed by the United States of America.

(Signed)

(Signed)

LOY N. MCINTOSH,

BERNHARDT FRANK,

Counsel for Said Appellees.

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